COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

No. _____

APPEALS COURT No. 2015-P-0663

BARNSTABLE COUNTY

COMMONWEALTH,
Plaintiff - Appellee

v.

MICHAEL GRUNDMAN,
Defendant - Appellant

DEFENDANT'S APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW OF THE DECISION OF THE APPEALS COURT

MEMORANDUM OF THE APPELLANT
IN FORMA PAUPERIS

ANDREW S. CROUCH
Attorney for the Defendant
22 Putnam Avenue
Cambridge, MA 02139
(617) 441-5111
acrouch@andrewcrouch.com
BBO #648496

OCTOBER 2016

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO.
APPEALS COURT
NO. 2015-P-0663

COMMONWEALTH

v.

MICHAEL GRUNDMAN

DEFENDANT'S APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW OF THE DECISION OF THE APPEALS COURT

REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Now comes Michael Grundman and applies for further appellate review of the order and published decision of the Appeals Court issued on October 5, 2016, affirming judgments of conviction of five counts of rape of a child. This request is founded upon substantial reasons affecting the interests of justice.

STATEMENT OF PRIOR PROCEEDINGS

On October 19, 2012, Mr. Grundman was indicted in Barnstable Superior Court on several charges, including rape of a child, in violation of G.L. c. 265, § 23. On September 23, 2013, the Commonwealth nolle prossed several charges and Mr. Grundman thereafter pleaded guilty to the five remaining counts

of rape of a child. On November 25, 2013, the court (Nickerson, J.) heard from the parties in a sentencing hearing. The court then sentenced Mr. Grundman to the Barnstable County Correctional Facility for two years on three counts, to run concurrently, and on the remaining two counts to a term of probation for ten years, to run concurrently with the term of incarceration, subject to a number of special conditions. In its sentencing order, the court failed to include the statutorily required condition of GPS monitoring. Despite the court not having ordered GPS monitoring as part of the original sentence, the case docket reflected GPS monitoring as a required condition in the case.

Due to the conflict between the docket and the oral sentence pronouncement, the defendant filed a motion to correct a clerical mistake on or about September 24, 2014, to address the GPS monitoring issue. The court denied Mr. Grundman's motion on September 26, 2014. It then ordered the parties to appear at a hearing on September 29, 2014, during which it sought to reimpose Mr. Grundman's sentence, this time including the previously omitted GPS monitoring condition in its oral pronouncement of the

sentence. It also extended the probationary term to run from and after the incarceration term. After the hearing, the court again denied the defendant's motion to correct the sentencing error.

On October 28, 2014, the defendant filed a motion for reconsideration of the denial of the motion to correct the clerical mistake.

On January 20, 2015, the court allowed Mr. Grundman's motion in part, changing the probation term to run concurrently to his sentence of incarceration instead of from and after its conclusion. The court denied Mr. Grundman's motion for reconsideration as to the GPS monitoring condition, stating that he had actual notice that the condition would be imposed as "contemporaneously with the sentencing hearing, the defendant, represented by counsel, did read and sign the probation contract enumerating the GPS condition and received a copy for his records." The court made this determination despite correctly noting that, as in *Commonwealth v. Williamson*, 462 Mass. 676, 685 (2012), "no similar overt discussion of the GPS condition occurred in the case at bar."

The defendant timely filed a second motion for reconsideration of the denial of his motion to correct

the clerical mistake and to vacate the GPS monitoring condition, which the court denied on April 3, 2015.

The defendant filed a timely notice of appeal on April 13, 2015. The case was entered in the Massachusetts Appeals Court on May 11, 2015. On June 9, 2016, a panel of justices of the Appeals Court (Carhart, Maldonado, and Henry, JJ.) heard oral argument. On October 5, 2016, the Appeals Court issued a published decision affirming the convictions. The defendant now files this application for leave to obtain further appellate review of the decision of the Appeals Court.

STATEMENT OF FACTS

In sentencing the defendant on November 25, 2013, the court failed to include the statutorily required condition of GPS monitoring. Despite the court not having ordered GPS monitoring as part of the original sentence, the case docket reflected GPS monitoring as a required condition in the case. In adding the GPS monitoring condition following the defendant's motion to correct the clerical mistake, the court determined that Mr. Grundman had actual notice that the condition would be imposed as "contemporaneously with the sentencing hearing, the defendant, represented by

counsel, did read and sign the probation contract enumerating the GPS condition and received a copy for his records." Neither party raised or addressed the issue of notice in its filings. In support of its decision, the trial court noted that "the defendant has not offered any affidavit from his sentencing counsel that would indicate that counsel did not properly review such material with the defendant."

Despite the court's ruling, there existed ample evidence on the record that sentencing counsel did not review the imposition of GPS monitoring with his client either before, during, or directly after the sentencing hearing. This failure was made plain during the hearing on the motion to correct the clerical error, held on September 29, 2014. At that hearing, which occurred more than a year after the plea hearing and almost a year from the date of sentencing. Attorney Roman informed the trial court that he did not believe that section 47 required the imposition of GPS monitoring on a plea to the offense of rape of a child, to which Mr. Grundman pleaded guilty. The exchange between the trial court and Attorney Roman follows:

THE COURT: Well, I think it goes without saying that he was sentenced to a GPS, correct?

MR. ROMAN: No, it does not.

THE COURT: It does not? And how do you figure that?

MR. ROMAN: Because attached to the motion was a printout of the plea colloquy and the sentence. And in the plea colloquy and the sentence, there was no discussion about GPS monitoring.

THE COURT: Is this a mandatory GPS situation?

MR. ROMAN: Not to my knowledge, Judge.

THE COURT: Commonwealth?

MR. GLENNY: It's my memory, your Honor, that GPS was ordered. I know it would be the Court's practice to order it in such a case.

THE COURT: Isn't it automatic on rape of a child?

MR. ROMAN: Not to my knowledge, Judge.

THE COURT: I take it you've read the statute and confirmed your knowledge against the statute?

MR. ROMAN: At one point, Judge, I believe that I did, although I have not read it today.

THE COURT: All right. So, he's going on probation for what charges, please, Mr. Clerk?

THE CLERK: He's going on probation for Count No. 2 of rape of a child. That's 265, 23. And Counts II and III of rape of a child; 265, 23.

THE COURT: Rape of a child under Section 23 is specifically an enumerated sex offense involving a child under Section 178C of Chapter 6, which therefore puts it into Section 47 of Chapter 265 as a sex offense involving a child as defined under 178C of 6, which makes it a mandatory

requirement. Why did you think it wasn't mandatory?

MR. ROMAN: Apparently I was wrong, your Honor.

As the issue of notice was first raised by the trial court in denying Mr. Grundman’s first motion for reconsideration, he sought to address the issue in his second motion for reconsideration. In that affidavit, Attorney Roman stated that he did not recall discussing with Mr. Grundman that GPS monitoring would be imposed and that he was not aware that it could be imposed as part of his probationary sentence following the guilty plea. Moreover, Attorney Roman stated that he does not recall being present when Mr. Grundman signed his probation contract, which included the first mention of the GPS monitoring condition. Attorney Roman further stated that he believes Mr. Grundman was already in custody when he signed the contract, which he believes was signed with the probation officer in the court lock-up at some point before Mr. Grundman was returned to the jail.

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Did the Appeals Court err in extending the law of actual notice, as stated in this court's holding in *Commonwealth v. Selavka*, to cases where the sentencing court specifically fails to inform defendants that they will be subject to the strict and invasive probationary condition of GPS monitoring as a consequence of their pleas?

2. Whether the Appeals Court erred in determining that a defendant can receive actual notice that his probation will be conditioned on the punitive requirement of GPS monitoring where the only notice he receives is in a single line of a probation supervision contract signed *after* the trial court accepts his plea, imposes sentence, and he leaves the courtroom.

3. Whether the Appeals Court's decision is consonant with justice and accurately reflects the state of the law of due process in Massachusetts?

REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

Further appellate review of this case is appropriate where the Appeals Court, in a published decision, erred in extending this court's holding in *Commonwealth v. Selavka*, to cases where the sentencing court failed to actually inform the young defendant that he would be subject to the invasive condition of GPS monitoring as a consequence of his probation before accepting his plea and imposing sentence.

In *Commonwealth v. Selavka*, this court held that due to the severity and punitive nature of the imposition of GPS monitoring, that "a defendant must

receive actual notice *from the sentencing judge* that his probation will be conditioned on such a harsh requirement." See 469 Mass. 502, 505 n.5 (2014) (emphasis added). While this court observed that the probation contract in *Selavka* did not include notice of the GPS condition, it did not suggest that this was a determinative fact, especially where it was undisputed that the trial court failed, as occurred here, to raise the issue of GPS monitoring at any point before the plea was taken or the sentence was subsequently imposed. The Appeals Court's published affirmance of the trial court's order allows for GPS monitoring and other serious, invasive conditions to be be imposed even where the sentencing judge fails to actually inform the pleading defendant of the required imposition of a punitive and harsh penalty in cases where he simply receives paperwork to that effect from a third party after sentencing has been completed.

As the defendant challenged the clerical mistake and sentencing error in timely motions, the argument is properly preserved for full appellate review by this Court.

ARGUMENT

I. IN CONTRAVENTION OF THE SPIRIT AND LANGUAGE OF THIS COURT'S DECISION IN *COMMONWEALTH v. SELAVKA,* THE APPEALS COURT ERRED IN DETERMINING THAT THE DEFENDANT RECEIVED ACTUAL NOTICE WHERE THE SENTENCING COURT FAILED TO INFORM HIM THAT HE WOULD BE SUBJECT TO GPS MONITORING AS A CONSEQUENCE OF HIS PLEA.

This court has made clear that due to the severity and punitive nature of the imposition of GPS monitoring, "a defendant must receive actual notice *from the sentencing judge* that his probation will be conditioned on such a harsh requirement." See *Selavka*, 469 Mass. at 505 n.5 (emphasis added). This court has held that the mere existence of section 47's mandatory GPS condition does not meet the requirement for actual notice. See *id.* ("GPS monitoring mandated by G.L. c. 265, § 47, is not like other conditions of probation that a sentencing judge need not always articulate."). The "singularly punitive" nature of GPS monitoring requires the sentencing court to fully inform the defendant before accepting a plea, namely that it must give the defendant "actual notice" that his probation will be conditioned on such a harsh requirement. See *Selavka*, 469 Mass. at 505 n.5.

A. The Court Failed To Inform Mr. Grundman That GPS Monitoring Would Be Imposed As A Consequence Of His Plea.

It is undisputed that the trial court failed to inform Mr. Grundman that GPS monitoring would be imposed following his plea. In reviewing the November 25, 2013, sentencing hearing, the trial court acknowledged, akin to *Selavka*, that "neither during the plea colloquy...nor at the subsequent sentencing hearing...was any mention made of the fact that G.L. c. 265, § 47, required the imposition of GPS monitoring as a condition of any term of probation' for the defendant in this case." The trial court also specifically noted this court's statements in *Selavka* mandating actual notice to the defendant of the sentencing mandate, writing that "[t]he mere existence of a statutory requirement for the GPS condition does not serve as constructive notice sufficient to eliminate a material conflict between written and oral expressions of a sentence."

B. The Sentencing Court's Failure To Provide Actual Notice Of The GPS Monitoring Condition Requires Its Removal, Regardless Of Whether He Subsequently Learned Of Its Application In His Probation Contract.

Despite acknowledging the trial court's obligation to provide the defendant with actual notice

of the GPS monitoring condition, the Appeals Court attempted to distinguish *Selavka* on the basis that Mr. Grundman's probation contract mentioned GPS monitoring whereas Selavka's did not. The Appeals Court then conducted a review, pursuant to *Commonwealth v. Williamson*, to determine whether Mr. Grundman received actual notice of the condition. In rendering its decision on the subject, which neither party had raised in its filings, the trial court determined that "contemporaneously with the sentencing hearing, the defendant, represented by counsel, did read and sign the probation contract enumerating the GPS condition and received a copy for his records." In concert with the language of section 47, the Appeals Court found this to be sufficient evidence demonstrating that Mr. Grundman received both constructive and actual notice of the GPS condition. Putting aside that the record does not support a finding that Mr. Grundman read and signed the probation contract with his lawyer, who admittedly did not understand that GPS monitoring would be imposed, the Appeals Court's decision that such facts would constitute actual notice as described in *Selavaka* is incompatible with current caselaw.

Selavka provides that due to the severity and punitive nature of the imposition of GPS monitoring "a defendant must receive actual notice *from the sentencing judge* that his probation will be conditioned on such a harsh requirement." See 469 Mass. at 505 n.5 (emphasis added). While this court observed that the probation contract in *Selavka* did not include notice of the GPS condition, it did not suggest that this was a determinative fact, especially where it was undisputed that the trial court failed, as here, to raise the issue of GPS monitoring at any point before the plea was taken or the sentence was imposed. For this reason, the defendant did not receive actual notice and is entitled to the removal of the GPS condition.

C. Mr. Grundman's Attorney Failed To Inform Him That GPS Monitoring Would Be Imposed As A Consequence Of His Plea.

In addition to its contention that the probation form signed after the plea hearing constituted sufficient actual notice of the imposition of GPS monitoring, the trial court also relied on a perceived absence of evidence that Mr. Grundman's trial counsel, Attorney Seth Roman, failed to inform him that the condition would be imposed. In support of its decision

denying the first motion for reconsideration, the trial court noted that "the defendant has not offered any affidavit from his sentencing counsel that would indicate that counsel did not properly review such material with the defendant."

There existed ample evidence on the record that sentencing counsel did not review the imposition of GPS monitoring with his client either before, during, or directly after the sentencing hearing. Nearly one year after the plea, Attorney Roman informed the sentencing court that he did not believe that section 47 required the imposition of GPS monitoring on a plea to the offense of rape of a child, to which Mr. Grundman pleaded guilty. The court then had to correct his errant understanding of the law. Attorney Roman made clear that he did not discuss with Mr. Grundman that GPS monitoring would be imposed and that he was not aware that it could be imposed as part of his probationary sentence following the guilty plea. Moreover, Attorney Roman stated that he does not recall being present when Mr. Grundman, who was involved with the court system for the first time here, signed his probation contract, which included the first mention of the GPS monitoring condition.

Attorney Roman further stated that he believed Mr. Grundman was already in custody when he signed the contract, which he believed was signed with the probation officer in the court lock-up at some point before Mr. Grundman was returned to the jail.

The record, at the time of the motion hearing and further supported by Attorney Roman's affidavit, demonstrates under the standards set forth in both *Williamson* and *Selavka* that Mr. Grundman did not receive actual notice from the sentencing court that he would be subject to the GPS monitoring condition following his guilty plea. He did not receive notice in the form of actual statements from the trial court during either the plea or sentencing hearings. His attorney did not know that GPS monitoring could or would be imposed as part of the probation conditions following the plea. His attorney never discussed the GPS probation condition with his client before, during, or after the plea or sentencing hearings. His attorney was not present with Mr. Grundman during the signing of his probation contract, which contained the first mention of the GPS monitoring condition.

Under these circumstances, the trial court could not fairly draw the inference that Mr. Grundman

received actual notice that he would be subjected to the harsh and singularly punitive condition of GPS monitoring as a consequence of his plea. The record existing at the time of the motion hearing and further supported by Attorney Roman's affidavit demonstrates under the standards set forth in *Williamson* and *Selavka* that Mr. Grundman did not receive actual notice from the sentencing court. As in *Selavka*, the belated correction of Mr. Grundman's sentence to include GPS monitoring contravened his legitimate expectation of finality.

Moreover, the trial court lacked authority to add the condition of GPS monitoring to the defendant's sentence where no motion was pending that allowed it to substantively alter the sentence. The court erred in denying the properly brought motion to correct a clerical error where the clerk's docket notation of the terms of the sentencing did not reflect the court's oral pronouncement, the latter of which controls. The court did not have authority to add a GPS monitoring condition based on Rule 29(a) or 30(a) as no such motions were pending or were time-barred.

The sentencing court's belated correction of Mr. Grundman's sentence to include the imposition of GPS

monitoring cannot stand as it contravened the defendant's legitimate expectation of finality in the terms of his initial sentence. While Mr. Grundman's initial sentence was illegal insofar as it did not include GPS monitoring, the subsequent imposition of GPS monitoring constituted a revision of that illegal sentence and violated the double jeopardy and due process provisions of article 12 of the Massachusetts Declaration of Rights and the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, the condition must be vacated.

The decision of the Appeals Court treats the serious, punitive condition of GPS monitoring as akin to standard, obvious conditions of probation, requiring no more notice than the simple printing as one term of several dozen on a probation contract signed after sentence is imposed. The Appeals Court's decision conflicts with this court's decision in *Selavaka*, fails to provide proper notice to defendants before the imposition of serious, non-standard, and punitive probationary terms, and creates a troubling precedent for future cases. The decision of the Appeals Court should be reviewed and reversed.

CONCLUSION

The interests of justice require further appellate review of the published decision of the Appeals Court entered in this case.

Respectfully Submitted,
MICHAEL GRUNDMAN,
By his attorney,

Andrew Crouch

Andrew S. Crouch (BBO# 648496)
22 Putnam Avenue
Cambridge, MA 02139
(617) 441-5111
acrouch@andrewcrouch.com

Date: October 17, 2016

Commonwealth v. Grundman

Appeals Court of Massachusetts

June 9, 2016, Argued; October 5, 2016, Decided

No. 15-P-663.

Reporter
90 Mass. App. Ct. 403; 2016 Mass. App. LEXIS 140

COMMONWEALTH *vs.* **MICHAEL C.** GRUNDMAN.

Prior History: [**1] Barnstable. INDICTMENTS found and returned in the Superior Court Department on October 19, 2012.

A motion to correct a clerical error in sentence, filed September 24, 2014, was heard by *Gary A. Nickerson*, J., and motions for reconsideration were considered by him.

Counsel: *Andrew S. Crouch* for the defendant.

Elizabeth A. Sweeney, Assistant District Attorney, for the Commonwealth.

Judges: Present: CARHART, MALDONADO, & HENRY, JJ.

Opinion by: HENRY

Opinion

HENRY, J. The defendant pleaded guilty to five counts of rape of a child involving two children, in violation of *G. L. c. 265, § 23*. He was sentenced to two years committed in a house of correction, and a probationary term of ten years commencing concurrently with the committed sentence. The sentencing judge imposed conditions of probation, including global positioning system (GPS) monitoring as mandated for this offense by *G. L. [*404] c. 265, § 47*, on the sentencing checklist. See *Commonwealth v. Guzman, 469 Mass. 492, 493, 14 N.E.3d 946 (2014)* (*section 47* "affords a sentencing judge no discretion whether to impose GPS monitoring on a defendant sentenced, as here, to a probationary term for an enumerated offense"). The docket reflected this sentence as well. However, the clerk did not read that GPS monitoring was a condition [**2] of probation aloud in open court. The clerk did read every other condition of probation during the oral sentencing, fifteen in total. The written conditions of probation signed by the defendant on the day of sentencing did include the GPS monitoring as a term of probation.

Nearly one year after the imposition of his sentence, the defendant sought to "correct" what the defendant characterized as a "clerical error" in his sentence, pursuant to *Mass.R.Crim.P. 42*, as amended, 378 Mass. 842 (1979), to remove the GPS monitoring condition. The matter is especially significant to the defendant because he aspires to become a commercial diver and that career is not compatible with GPS monitoring. After a hearing, the defendant's motion was denied, and the judge noted that the failure to orally impose GPS monitoring was an inadvertent error. The judge ordered the defendant to appear in court for a correct reading of his sentence on the record. The defendant filed two motions for reconsideration that also were denied.

On appeal, the defendant challenges the GPS monitoring on grounds that the sentencing judge lacked authority to add the GPS monitoring condition, its imposition violated double jeopardy principles, and the defendant did [**3] not receive actual notice of the GPS monitoring condition from the court. We affirm.

Background. Pursuant to a plea agreement on

September 23, 2013, the defendant pleaded guilty to five counts of rape of a child involving two children, in violation of *G. L. c. 265, § 23*.[1] At the time of the offenses the defendant was twenty years old and a lifeguard at a community pool. The victims were two fourteen year olds. The Commonwealth and the defendant agreed to a sentencing recommendation of two years committed in a house of correction, followed by a probationary term of ten years.[2] During [*405] the plea colloquy there was no mention of GPS monitoring as a condition of probation.

The sentencing hearing was held on November 25, 2013, before the same judge. No overt discussion of GPS monitoring occurred at the sentencing. In arguing in favor of the joint recommendation, the Commonwealth contended that the long period of probation would provide time for supervision. Defense counsel argued for a more lenient sentence than the joint recommendation, suggesting that the defendant could be sufficiently punished through his served term of incarceration, followed by a

> "probationary term of five years with special conditions and the typical special conditions, and a stay-away from the victims, both of them and their families; and that he stay away from Sandwich High School; that he engage in counseling, including sex offender counseling and treatment as deemed appropriate by the probation department. And also, that he remain employed or enrolled as a full-time student at a college or vocational educational program."[3]

Defense counsel acknowledged that the defendant was subjected to GPS monitoring while he was on bail, and the defendant was aware that he would be required to register as a sex offender for the rest [**5] of his life, which would affect "[his] employment possibilities."

The judge sentenced the defendant to a two-year period of incarceration[4] and a ten-year term of probation, to run concurrently with the committed portion of the sentence.[5] Notwithstanding the requirements of *G. L. c. 265, § 47*, GPS monitoring was [*406] not orally stated as part of the defendant's sentence. However, the sentence specifically articulated: "[T]he [c]ourt places you on probation, ten years, said probation to run concurrently with the sentences imposed in [c]ount [one] of [indictment] 136-01 and [c]ount [one] of [indictment] 136-02, *subject to the terms and conditions of the probation department*, with the following special conditions" (emphasis supplied). The clerk then read the sentence and every special [**6] condition of probation except the provision requiring GPS monitoring.[6]

---

[1] Prior to the defendant's plea colloquy, the Commonwealth entered nolle prosequis for five counts of rape of a child, two counts of dissemination of harmful matter to a minor, and two counts of open and gross lewdness. On the day of the colloquy, the Commonwealth entered nolle prosequis for two counts of rape of a child and one count of witness intimidation.

[2] There is conflicting material as to whether the sentence was a joint recommendation or the Commonwealth's recommendation. However, this determination is unnecessary as it does not affect [**4] our review of the plea sentencing or the terms of probation.

[3] Although defense counsel requested that the defendant's sentence include "special conditions and the typical special conditions," defense counsel informed the judge, during the September 29, 2014, motion hearing, that he was unaware of the GPS requirement in *§ 47* and did not inform the defendant of this condition prior to his sentencing. As such, the defendant's sentencing recommendation could not serve as proper notice for the imposition of this condition.

[4] The defendant was sentenced on count one of indictment 2012-136-01, rape of a child, and on count one of indictment 2012-136-02, rape of a child, to two years concurrently on each count, to be served in a house of correction.

[5] The defendant was sentenced to ten-year probationary terms to run concurrently for count two of indictment 2012-136-01, and counts two and three of indictment 2012-136-02.

[6] Those conditions included orders directing the defendant to (1) enroll in sexual abuse perpetrator counseling; (2) have no contact with the victims or their families and to stay away from Sandwich High School and other schools; (3) abstain from living with children who are not his own; (4) have no contact with minor children without the supervision of an appropriate adult caretaker approved by the court or the probation department; (5) not harass the victims or their families; (6) not be employed where he could have regular contact with minor children; (7) not perform any volunteer activities that place him in contact with minor children; (8) reimburse the victims for any out-of-pocket expenses resulting from his offense;

On the day of the sentencing hearing, the defendant signed the acknowledgment of his probation order, which delineated the terms and conditions of his probation.[7] This probation check-off sheet stated, within the special conditions of probation section, under the sex offender registration heading:

> "You shall register with the Sex Offender Registry Board and local police in accordance with G. L. c. 6, § 178E, shall *wear a GPS or comparable device in accordance with* G. L. c. 265, § 47, shall abide by the geographic exclusion zones established by the Commissioner of Probation, and shall pay the required fees unless waived by the [c]ourt" (emphasis supplied).

[*407] The GPS monitoring condition also was included in the docket entry, dated November 25, 2013, which listed the defendant's sentence. [**8]

The defendant filed a motion to revise and revoke his sentence, pursuant to *Mass.R.Crim.P. 29(a)*, 378 Mass. 899 (1979), on January 23, 2014, offering additional mitigating information regarding the defendant's mental health, but he failed to raise the question of GPS monitoring. The motion judge, who was also the plea and sentencing judge, denied the motion on March 11, 2014.[8]

On September 24, 2014, the defendant moved to correct a "clerical mistake," pursuant to *Mass.R.Crim.P. 42*, 378 Mass. 842 (1979), asserting that the imposition of the [**9] GPS monitoring condition of his probation was in error, as this condition was not imposed orally during the defendant's sentencing hearing. The judge denied the defendant's motion on September 26, 2014, and directed the defendant to appear in court for "the corrected reading of the sentence on the record." That same day, the defendant filed a motion for postconviction relief.

During the hearing on the defendant's motion for postconviction relief, defense counsel stated that he did not believe that G. L. c. 265, § 47, requires GPS monitoring as a probation condition for the defendant's convictions and, similarly, the defendant was not aware of the requirement, as it was not expressly stated during the sentencing hearing. Defense counsel argued that the defendant should not be subject to GPS monitoring because he had already served his committed sentence and hoped to become a commercial diver after his term of parole.[9] The judge explained that G. L. c. 265, § 47, mandates such monitoring and ordered the defendant to be resentenced, to include the GPS monitoring probation condition on the record. Defense counsel did not object to the resentencing or the oral pronouncement.[10]

[*408] The defendant filed a motion for reconsideration, pursuant to *Mass.R.Crim.P. 30(a)*, as appearing in 435 Mass. 1501 (2001), on October 28, 2014. In support of this motion, the defendant offered an affidavit from his counsel at the

---

(9) abstain [**7] from using alcohol or any illicit drugs; (10) submit to random breathalyzer tests and urine screens; (11) maintain full-time employment, job training, or employment search activities or education; (12) report to the probation department within forty-eight hours of release; and (13) pay an assessment of fees. The defendant was notified of his obligations to (1) provide a deoxyribonucleic acid sample within one year; and (2) register as a sex offender.

[7] In signing his acknowledgment of the order of probation, the defendant averred that:

> "I have read and understand the conditions of probation, and I agree to obey them. I understand that if I violate any of these conditions, I may be arrested or ordered to appear in court, the conditions of my probation may be changed, the term of my probation may be extended, my probation may be revoked, and I may be incarcerated. I have received a copy of this order."

[8] The judge explained that "[t]he [c]ourt was well aware of the nature and extent of the defendant[']s mental health issues at the time of sentencing. The attached materials do not warrant a change in sentence." The defendant did not appeal the denial of this motion.

[9] Counsel represented that the defendant would not be [**10] able to work as a commercial diver if he were obligated to wear the GPS monitoring equipment, because the water would render the equipment inoperable.

[10] The oral resentencing pronouncement inadvertently sentenced the defendant to probation to run "from and after the committed sentences," rather than concurrently, as originally ordered by the judge. That mistake was a subject of the defendant's motion for reconsideration filed on October 28, 2014, and was subsequently corrected in the January 20, 2015, memorandum and order.

sentencing hearing confirming that he had not discussed GPS monitoring with the defendant and that counsel "was not aware GPS monitoring would be required as part of [the defendant's] probationary sentence." The judge denied the defendant's motion on January 20, 2015, with respect to the GPS monitoring condition, and denied the defendant's second motion to reconsider on April 3, 2015. This appeal followed.

Discussion. "A criminal defendant has the right to be present at his own sentencing." [**11] *Commonwealth v. Williamson, 462 Mass. 676, 685, 971 N.E.2d 250 (2012)*, quoting from *United States v. Vega-Ortiz, 425 F.3d 20, 22 (1st Cir. 2005)*. "Consistent with [the] right [to be present at sentencing], the oral pronouncement of a sentence generally controls over the written expression where there exists a 'material conflict' between the two." *Ibid.*, quoting from *United States v. Ortiz-Torres, 449 F.3d 61, 74 (1st Cir.)*, cert. denied sub nom. *Cosme-Piri v. United States, 549 U.S. 941, 127 S. Ct. 335, 166 L. Ed. 2d 250 (2006)*, cert. denied sub nom. *Torres-Santiago v. United States, 549 U.S. 967, 127 S. Ct. 416, 166 L. Ed. 2d 294 (2006)*, and cert. denied sub nom. *Mattei-Albizu v. United States, 549 U.S. 1313, 127 S. Ct. 1895, 167 L. Ed. 2d 378 (2007)*. The Supreme Judicial Court has addressed an error in sentencing such as the one here in two recent cases: *Commonwealth v. Selavka, 469 Mass. 502, 14 N.E.3d 933 (2014)*, and *Williamson, supra.*

The defendant argues that *Selavka* controls. There, as here, the defendant's oral sentence was illegal for its failure to include GPS monitoring as required by *G. L. c. 265, § 47*. In that case, after the defendant had completed his committed sentence, the Commonwealth filed a motion for GPS monitoring of the defendant, which was allowed. Selavka appealed. See *Selavka, supra at 503*.

The Supreme Judicial Court, in reviewing the legality of the addition of the GPS monitoring, recognized that the Commonwealth and sentencing judge must have a mechanism to correct an illegal sentence and set a time limit of sixty days to act.[11] See *id. [*409] at 508*. Within that timeframe, "a sentence remains conditional rather than final in nature." *Ibid.* Although a judge is empowered to correct an illegal or incorrect [**12] sentence,[12] "even an illegal sentence will, with the passage of time, acquire a finality that bars further punitive charges detrimental to the defendant." *Id. at 509*. Because the sentence correction in *Selavka* occurred outside that sixty-day period, the court considered and concluded that the belated imposition of GPS monitoring violated the principle of finality and constituted impermissible multiple punishment in violation of double jeopardy protections. See *id. at 514*.

In reaching this conclusion, the court specifically rejected the Commonwealth's argument that *G. L. c. 265, § 47*, operates automatically. The court specifically stated:

> "The GPS monitoring mandated by *G. L. c. 265, section 47*, is not like other conditions of probation that a sentencing judge need not always articulate. … Unlike those routine conditions, which include compliance with all laws and orders of the court, contact with the probation officer at his request, and reasonable efforts to obtain and maintain employment, the imposition of GPS monitoring is singularly

---

[11] Under ***Mass.R.Crim.P. 29(a)***, *supra*, "[t]he trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence … may upon such terms and conditions as he shall order, revise and revoke such a sentence if it appears that justice may have not have been done." In *Selavka*, the Supreme Judicial Court provided an equal time for the Commonwealth to seek correction of an illegal sentence, because under ***rule 29(a)***, "a sentence remains conditional rather than final in nature" and will "reasonably balance[ ] the defendant's interest in finality against society's interest in law enforcement." *Selavka, supra at 508*, quoting from *Aldoupolis v. Commonwealth, 386 Mass. 260, 275, 435 N.E.2d 330 (1982)*.

[12] See *Selavka, supra at 505*, quoting from *Goetzendanner v. Superintendent, Mass. Correctional Inst., Norfolk, 71 Mass. App. Ct. 533, 537, 883 N.E.2d 1250 (1985)* ("illegal sentence is one that is 'in some way contrary to the [**13] applicable statute'").

punitive in effect. See *Commonwealth v. Cory, 454 Mass. 559, 568-569, 911 N.E.2d 187 (2009)*. For this reason, a defendant must receive actual notice from the sentencing judge that his probation will be conditioned on such a harsh requirement."

Id. at 505 n.5.

The other relevant case is *Williamson*. In that case, the defendant was sentenced to one year of incarceration in open court. See *Williamson, 462 Mass. at 679*. Thereafter, a community parole supervision for life (CPSL) condition was entered on the docket. *Ibid.* The defendant moved to vacate the CPSL condition. *Ibid.* The motion judge, who was the same judge who heard the de- [*410] fendant's plea, denied the motion under the mistaken belief that the CPSL condition was mandatory. *Ibid.* The Supreme [**14] Judicial Court held that the CPSL condition was not mandatory and remanded for resentencing. *Id. at 683-684*. The court rejected the defendant's argument that CPSL could not be added to his sentence, reasoning that although the sentencing judge did not include CPSL in the oral sentence, the defendant had prior notice of the condition, as CPSL was part of the joint sentencing recommendation and both the Commonwealth and plea counsel explicitly mentioned the imposition of CPSL. *Id. at 685-686*. Additionally, the defendant expressed his concern about the cost of CPSL monitoring to the sentencing judge after the imposition of his sentence. *Ibid.* "Accordingly, given the circumstances, although [GPS monitoring] was not imposed in open court, there exists no conflict that is material between the sentence orally imposed and that memorialized on the docket." *Id. at 686*.

The factual scenario here falls between *Williamson* and *Selavka*. In all three cases, the condition of probation at issue was not expressly stated by the judge or clerk during the sentencing hearing. In *Williamson*, both counsel discussed the probation term at issue in front of the defendant during sentencing, which did not happen in this case. However, here the [**15] motion judge found that the defendant had actual notice of the GPS monitoring condition because the oral pronouncement of his sentence expressly stated that the defendant's probationary term was "subject to the terms and conditions of the probation department." That same day as the sentencing, the defendant signed his acknowledgment of the conditions of probation, which included mandatory GPS monitoring within the terms and conditions of the defendant's probation. The defendant averred that he read and understood the probation terms and that he received a copy. This fact sets the case apart from *Selavka*, where the defendant's written probation order did not mention GPS monitoring. See *Selavka, supra at 503-504*. Because we agree that the defendant received notice that his sentence was subject to the conditions of the probation department, and through the written probation conditions that included contemporaneous notice of GPS monitoring, we conclude that "there exists no conflict that is material between the sentence orally imposed and that memorialized in the docket" and the GPS condition "was properly imposed in the first instance." *Williamson, supra at 686*. As a result, double jeopardy was not violated. [**16] Nor was the sixty-day limit to change a sentence under [*411] *rule 29(a)* violated.[13]

Significantly, the defendant did not object to the GPS monitoring condition when he received and signed his terms of probation, nor did he object to the condition during his resentencing hearing.[14]

[13] To be sure, the best practice is to state the condition of GPS monitoring explicitly during the reading of the sentence. See *Selavka, supra at 505 n.5*.

[14] The addition of GPS monitoring does not violate Federal law. See e.g., *Thompson v. United States, 495 F.2d 1304, 1306 (1st Cir. 1974)* ("a trial court not only *can* alter a statutorily-invalid sentence in a way which might increase its severity, but *must* do so when the statute so provides"); *Ortiz-Torres, 449 F.3d at 74* ("no material conflict exists where the defendant is on notice that he is subject to the terms included in the written judgment"). See also *Bozza v. United States, 330 U.S. 160, 166, 167, 67 S. Ct. 645, 91 L. Ed. 818 (1947)* ("sentence, as corrected, imposes a valid punishment"). Also,

Moreover, the defendant filed a motion to revise and revoke his plea within sixty days of his sentencing hearing, but failed to challenge the imposition of GPS monitoring at that time.

Conclusion. The order denying the defendant's motion to correct clerical mistake is affirmed. The orders denying defendant's motions for reconsideration are affirmed.[15]

So ordered.

"if the original sentence was erroneous, the Constitution contains no general rule prohibiting a court from finding that sentence erroneous and holding that a sentence of greater length [**17] was required by law." *Espinoza v. Sabol, 558 F.3d 83, 87 (1st Cir. 2009)*.

[15] In light of our disposition, we do not reach the Commonwealth's argument that the defendant's motions seeking to remove a probation condition was essentially a motion to resentence and remove a condition, thereby opening the sentence for restructuring.

CERTIFICATE OF SERVICE

I, Andrew S. Crouch, hereby certify that on October 17, 2016, I have served the foregoing Application for Further Appellate Review on the Commonwealth by mailing copies thereof by first-class mail, postage prepaid to:

Elizabeth Anne Sweeney, Esq.
Office of the District Attorney/Barnstable
3231 Main Street
PO Box 455
Barnstable, MA 02630

Andrew Crouch
Andrew S. Crouch